No. 93-37

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

TODD ALLEN DIMMIG, Petitioner,

-Vs-

ROBERT "Pete" WAHL, Respondent.
individually and as Sheriff
of LaSalle County, Illinois,
a body politic,

Petitioner for Writ of Certiorari

To The United States Court of Appeals

For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

TODD ALLEN DIMMIG

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Petitioner pro-se

QUESTION PRESENTED

WHETHER THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT VIOLATED FREEDOM OF SPEECH AND DUE PROCESS OF LAW IN EXPANDING UPTON -V- THOMPSON, 930 F.2d 1209 (1991) TO INCLUDE POLITICAL IN-ACTIVITY AS AN APPROPRIATE CONSIDERATION WHO WILL SERVE AS A DEPUTY SHERIFF IN VIOLATION OF DEPUTY'S RIGHT TO SPEAK FREELY AND THE RIGHT TO REFRAIN FROM SPEAKING AT ALL THROUGH WORDS OR ACTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS?

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TODD ALLEN DIMMIG petitions for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review a decision filed January 6, 1993, in Dimmig -v- Wahl, 983 F.2d 86 (7th Cir. 1993).

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit affirming an order of the United States District Court for the Northern District of Illinois, Eastern Division dismissing the complaint in case no. 90-c-5122. The decision of the Court below is reported as Dimmig -v- Wahl, 983 F.2d 86 (7th Cir. 1993) and was decided on January 6, 1993, and appears in Appendix 1 of this petition.

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was filed on January 6, 1993, jurisdiction of the Court was involked pursuant to Title 28 U.S.C. 1291.

On April 15, 1993, an order granting a 52 day extension of time within which to file petition for writ of certiorari was

issued. App at 9.

Statutory provision believed to confer jurisdiction on this Court is Title 28 U.S.C. 1254, 1254(1). App at 10.

CONSTITUTIONAL PROVISIONS AND STATUTES

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7. Ill. Rev. Stat., ch. 125, par. 7, App at 12.

8. Ill. Rev. Stat., ch. 125, par. 14A, App at 12,13.

9. Ill. Rev. Stat., ch. 34, par. 429.18, App at 14.

STATEMENT OF THE CASE

The United State District Court, for the Northern District of Illinois, Eastern Division, had jurisdiction involked under Title 28 U.S.C. 1331 and 1343(3).

The case involves a claim by the Petitioner, - TODD ALLEN DIMMIG, that he was allegedly improperly discharged by his

employer, ROBERT "Pete" WAHL, the Sheriff of LaSalle County, Illinois, in retaliation for his refusal to actively campaign on behalf of Wahl in Wahl's campaign for re-election in violation of his First and Fourteenth Amendment Rights.

The Defendants filed a Motion for Judgment on the Pleadings and the District Court, (Judge Holderman presiding) granted Defendants motion holding that under Upton v. Thompson, 930 F.2d 1209 (7th Cir., 1991) and Thulen v. Bausman, 938 F.2d 84 (7th Cir. 1991), a sheriff may use political considerations when determining who will serve as a deputy sheriff and that political considerations can reasonably include Dimmig's refusal to become involved in Wahl's campaign.

On January 6, 1993, the United States Court of Appeals for the Seventh Circuit, (BAUER, Chief Judge delivered decision), affirming the judgement and order of the District Court holding that "We rejected the deputies' claims in UPTON and instead concluded that deputy sheriffs operate with sufficient level of autonomy and discretionary authority to justify a sheriff's use of political considerations when determining who will serve as deputies." App at 3. The Court additionally recognized Dimmig's attempts to distinguish UPTON as being correct, [App at 3], in UPTON

the deputy sheriffs actively campaigned **against** the sheriff, where Dimmig remained in-active and neutral and campaigned neither for or against anyone. [App at 3]. The Court went on to conclude that Dimmig's distinguishing of UPTON lacked merit. [App at 4]. The Court in UPTON held that Illinois sheriffs do not violate the First Amendment by taking political considerations into account when deciding whether to fire a particular deputy sheriff. Thusly, under UPTON, even though there was no allegation of disruptive action or demonstraable fact that Dimmig's refusal to campaign on behalf of Wahl would hinder the effective performance of Wahl's department, the Court concluded that Dimmig's complaint lacked merit because the Constitution permitted Wahl to discharge Dimmig for refusing to campaign for him. [App at 4].

REASONS FOR GRANTING WRIT

I. THE EXPANSION OF UPTON MAY NOW BE USED AS A TOOL TO COMPEL SPEECH IN THE FORM OF POLITICAL ACTIVITY BY SHERIFFS THAT VIOLATES FIRST AMENDMENT GUARANTEE OF FREEDOM OF SPEECH.

The right to speak freely without fear of governmental

reprisals is protected by the First Amendment.]App at 10]

In the case now before the Court, the United States Court of Appeals for the seventh Circuit, (Judge Bauer delivered the decision), relied on **Upton -Vs- Thompson, 930 F.2d 1209 (7th Cir., 1991)** in affirming the judgment and order of the District Court in its dismissal of the complaint in case no. 90-c-5122, reported as Dimmig -v- Wahl, 983 F.2d 86 (7th Cir. 1993, short title). [App at1-5].

In UPTON, supra., the deputy sheriff was discharged from his position as deputy sheriff for political consideration. The consideration in UPTON was the disruptive actions of the deputy sheriff that hindered the effective performance of THOMPSON'S department. The disruptive actions entailed political activity against the Sheriff. UPTON was additionally situated in politically influential posts and was in a position to organize political activity against Thompson.

On the case now before the Court, it was Petitioner's political in-activity and neutrality that precipitated his discharge as deputy sheriff.

It is, as Judge Bauer concludes, the in-activity and neutrality that renders Dimmig distinguishable from UPTON, further, aside from the in-activity and neutrality is the fact that Petitioner was not situated in any politically influential posts

and was not in a position to organize any political activity against Wahl. There were no allegations by Wahl claiming that the in-activity and neutrality would prevent the effective performance of his department. Even though the Court of Appeals recognized these distinguishing factors it went on to conclude that these factors lacked merit, because, in UPTON "We held that Illinois sheriffs do not violate the First Amendment by taking political considerations into account when deciding to fire a particular deputy sheriff." In this manner the Court of Appeals has now expanded UPTON to include political in-activity and neutrality as an appropriate consideration when deciding to fire a particular deputy sheriff. Deputy sheriffs may not speak through words or acts against a sheriff, they are now compelled to speak or act on behalf of the sheriff. Deputies must now affirm and conform their beliefs to that of sheriffs. To be required as UPTON now requires would disavow the meanings and limitations of the first Amendment Right to freedom of speech and would eliminate the concomitant right to decline to foster the beliefs of sheriffs, it would compel speech in the form political activity. See: WEST VIRGINIA BOARD OF EDUCATION -v- BARNETTE, 319 U.S. 624, 63 S.Ct. 1178, 633 at 1183; "It would seem that involuntary affirmation could be commanded on even more immediate and urgent grounds than

silence." Further, "words uttered under coercion are proof of loyalty to nothing but self-interest." BARNETTE, supra., 644 at 1188 [Justice Black and Douglas concurring].

In the instant case there is the obvious and compelling fact that Wahl made no allegations that petitioner had disrupted his department, there was no demonstration of any overriding governmental interest that would require that Petitioner's private beliefs must conform to that of Wahl's. BRANTI -v- FINKEL, 100 S.Ct. 1287 (1977); teaches that "If an employees private beliefs would interfere with the discharge of his duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency." Id at 366, 96 S.Ct. 2686 [Emphasis Added]. Thusly, the expansion of UPTON restricts and violates Petitioner's Guarantee of freedom of speech under the First Amendment.

A. THE COMPELLING OF SPEECH IN THE FORM OF POLITICAL ACTIVITY RESTRICTS AND VIOLATES PETITIONER'S RIGHT TO SPEAK FREELY AND HIS RIGHT TO REFRAIN FROM SPEAKING AT ALL.

While Petitioner does not dispute that the prohibition on the encroachment of First Amendment Protections is not absolute and that restraints are permitted for appropriate reasons and that he has no right to a government benefit, he does dispute the compelling of speech in the form of political activity, where, as in the instant case there is no demonstrable fact that political in-activity and neutrality impairs governmental effectiveness and efficiency.

This court in ELROD -v- BURNS, 96 S.Ct. 2673 (1976); enunciated that government must demonstrate that the denial of a public benefit is not used for the purpose of creating an incentive enabling it to achieve what it may not command directly. There must be no threats of dismissal for failure to provide active support of the favored party in power. This type of coercion only inhibits protected beliefs and associations. The discharge of Petitioner for his political in-activity and neutrality in Wahl's campaign, his failure to provide active support of Wahl only penalized Petitioner's exercise of his right to remain in-active and neutral, to not be compelled to speak on behalf of Wahl through either words or actions. See also: WOOLEY -v- MAYNARD, 430 U.S. 705, 714 (1977) "We begin with the proposition that the right of freedom of thought protected by the First Amendment against State action includes

both the right to speak freely and the right to refrain from speaking at all." [Emphasis Added].

The Right to speak freely and the Right to refrain from speaking at all was stated 50 years ago in: WEST VIRGINIA BOARD OF EDUCATION -v- BARNETTE, 319 U.S. 624, at 642, "The Right of freedom of thought and of religion as guaranteed by the Constitution against state action includes the right to speak freely and the right to refrain from speaking at all." The question here is, whether under our Constitution the compulsion as employed here is a permissible means in achievement of political activity, is it permissible under the First Amendment to require Petitioner to profess his belief in a particular party and speak on behalf of a sheriff when his beliefs and affiliations may not be those of the sheriff. If the teachings of Barnette, supra., are followed, the answer must be a resounding no, that it is not permissible and violates and restricts the freedom of speech. If there is dissent, which in this case there was dissent in the form of political in-activity and neutrality, and there begins an elimination of dissent, "Those who have begun the process will soon find themselves exterminating dissenter." BARNETTE, supra., 319 U.S. at 641. In the instant case there was no eminent danger to the internal or external functions of Wahl's department. Wahl, put simply, required that his deputies be

unified in their support, to speak on behalf as one or suffer discharge for not doing so. BARNETTE, supra., teaches: "Compulsory unification of opinion achieves only the unanimity of the graveyard." 641 at 1187.

It is well settled that the right to speak freely and the right to refrain from speaking are complementary components of the broader concepts of 'individual freedom of thought, and when that speech is compelled the individual freedom of speech is violated, a practice repugnant to First Amendment jurisprudence. Such is Petitioner's situation.

B. THE EXPANSION OF UPTON TO INCLUDE AS AN APPROPRIATE CONSIDERATION POLITICAL IN-ACTIVITY AND NEUTRALITY WHO WILL SERVE AS A DEPUTY SHERIFF VIOLATES FIRST AMENDMENT GUARANTEE OF FREEDOM OF SPEECH.

It is the position of Petitioner that it was the political in-activity and neutrality of Petitioner in refusing to campaign for Wahl that formed the basis of the discharge of Petitioner, the political affiliation, and not vital governmental interests. The ultimate discharge of Petitioner was not founded on the basis of what Petitioner said or did, rather, it was based on what he did not say or do, it was the lack of political activity and association, not compelling governmental interests, that Wahl used in

determining that Petitioner would not remain a deputy sheriff in his department. Wahl attempted to enlist Petitioner in his re-election bid as sheriff of LaSalle County, Illinois. When that support was not forthcoming Wahl discharged Petitioner for the sole purpose of that in-activity and lack of support. It is that conditioning of the public hiring decisions, those based on political beliefs or associations that violates the First Amendment Rights of applicants in the absence of vital government interest. The questions before this Court is whether Wahl without sufficient justification, was pressuring employees to discontinue the free exercise of their First Amendment rights and whether that pressure violates those First Amendment Rights. "What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly. "See: RUTAN -v- REPUBLICAN PARTY OF ILLINOIS, 110 S. Ct. 2729 (1990) at 2738, 2739 [5-6].

It is the undisputed allegation that Petitioner was discharged soley for his in-activity and neutrality, his refusal to speak or act on behalf of Wahl in a political manner in violation of his First Amendment rights. The United States Court of Appeals has now expanded Upton in such a manner as to include the refusal to campaign on behalf of a sheriff within the boundaries of appropriate political considerations that can lead to discharge of

deputies refusing to do so. Petitioner did not proselytize the beliefs of Wahl nor did he proselytize against those beliefs, he simply remained in-active and neutral. If the First Amendment guarantees the protection of a public servant from discharge based on what he has said and it must also protect what he believes, then it must necessarily follow that what he has not said and what he does not believe must also be protected against discharge under the First Amendment.

It appears as inapposite that in-activity and neutrality is to be equated in the same context as political activity especially since political activity against a sheriff is necessarily hostile toward the sheriff and in-activity is not hostile.

It is the essence of the position of deputy sheriffs that must be considered, when that is accomplished, it becomes clear that in-activity and neutrality would operate with no effect on the effective performance of a sheriff's department. Consider: the essence of that position is that of peace officer (Ill. Rev. Stat., 1985 ch. 38, par. 2-13), sworn to uphold, execute and enforce the law of the land. App 11. Political loyalty to the sheriff is not necessary, and probably should not even be a factor in the discharge of a deputy's duties to enforce the law. Just as political differences between an assistant Public defender and a chief public defender do not prevent them from discharging their

mutual professional obligations to their client, [1] political differences between a sheriff and his deputy do not, by themselves, prevent them from discharging their mutual duties as law enforcement officers.

The sheriff and his deputies have the same duties with respect to law enforcement under Illinois law. They must attend upon open Court and obey the orders of the court (Ill. Rev. Stat., Ch. 125, par. 19), App.13; They must prevent crime, arrest suspected offenders and keep the peace (Ill. Rev. Stat., Ch. 125, par. 17, 82), App. 13,14. They must also take the same oath of office as any other law enforcement officer. Nothing in the inherent power of deputy sheriff under Illinois law renders political affiliation with the sheriff a prerequisite to the discharge of the duties of a deputy sheriff.

The powers and duties of a deputy sheriff are not co-extensive with those for the sheriff. Only the sheriff has the power to

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1. This Court held in ELROD -v- BURNS, 427 U.S. 347 (1976), that the practice of patronage dismissals clearly infringes First Amendment interests (427 U.S. at 360); and, that because it is doubtful that the mere difference of political persuasion motivates poor performance, it may not be used as a basis for imputing such behavior, or for imputing disposition to ill-willed conduct (427 U.S. at 365).

appoint deputy sheriffs (Ill. Rev. Stat., ch. 125, par.7), App 12. Only the Sheriff controls the internal operations of his office (Ill. Rev. Stat. ch. 125, par. 14A), App 12,13. It is the latter provision that the sheriff makes policy with respect to the operations of the Sheriff's department. Only the Sheriff has the power to decide how he can best serve the public, and how he can best utilize his resources. While a particular deputy may have occasion to contribute by way of suggestion or consultation with the Sheriff, this is not an inherent attribute of the office of deputy sheriff. Since a deputy Sheriff does not have policy making responsibility under Illinois law, it cannot be said that political loyalty is essential to the discharge of his duties. Given these factors, it becomes clear that to include political in-activity and neutrality as a political consideration who will serve as a deputy sheriff violates the First Amendment Guarantee of freedom of speech.

C. SINCE NO EMINENT DANGER TO GOVERNMENTAL INTEREST CAN BE DEMONSTRATED, COMPELLING OF SPEECH IN THE FORM OF POLITICAL ACTIVITY VIOLATES FIRST AMENDMENT GUARANTEE OF FREEDOM OF SPEECH.

In the case now before the Court, the questions are whether the discharge of Petitioner conforms to the required mandates

concerning political considerations and whether those considerations are based on mere legitimate state interest or are they based on advanced paramount, vital governmental interest in this case. In ELROD -v- BURNS, 96 S.Ct. 2673 (1976), this Court stated: "If conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights". ELROD, 96 S. Ct. at 363. In the instant case there was no paramount vital governmental interest advanced. The discharge of Petitioner was for the sole purpose of his political in-activity and neutrality. There was no danger to the effective performance of Wahl's department, no disruption of his office nor was that contended, Petitioner merely chose to be in-active and neutral, to exercise his right not to be coerced into speaking by word or act his beliefs, whether against or on behalf of Wahl. If there had existed a basis of claiming poor job performance or insubordination Wahl could have claimed such, however, such was not the case in this instance. The result is that it is clear that the discharge was based on Petitioner's refusal to state his political beliefs and associations, that Wahl based his reason for

discharging Petitioner soley on political purposes without vital government interest that is required. BRANTI -v- FINKEL, 100 S.Ct. 1287 (1980) dictates that government, unless it can demonstrate, "an overriding interest, " 427 U.S. at 368, 96 S. Ct. at 2687, "of vital importance" Id., at 362, 96 S. Ct. at 2684, his beliefs cannot be the sole basis for depriving him of continued public employment. BRANTI, 100 S. Ct. at 516.

RUTAN -v- REPUBLICAN PARTY OF ILLINOIS, 100 S.Ct. 2729 (1990) at 2739, similarily holds the lack of overriding government interest and the discharging of public employees soley for political purposes is unconstitutional action violative of First Amendment guarantees of freedom of speech.

This Court stated the premise clearly when it stated in WEST VIRGINIA BOARD OF EDUCATION -v- BARNETTE, 319 U.S. 624, at 642, "If there is any fixed star in our Constitutional Constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein." Thusly, the compelling of speech in the case now before the Court, absent that paramount vital interest violates Petitioner's guarantees of freedom of speech under the First Amendment.

II. PETITIONER WAS DENIED DUE PROCESS OF LAW IN THAT THE EXPANSION OF UPTON IN COMPELLING SPEECH IN THE FORM OF POLITICAL ACTIVITY VIOLATES PETITIONER'S RIGHT TO DUE PROCESS OF LAW GUARANTEED HIM BY THE FOURTEENTH AMENDMENT BY DENYING RIGHTS SECURED HIM BY THE UNITED STATES CONSTITUTION.

In the case now before the Court, Petitioner was denied due process of law in that he was denied substantial rights guaranteed him under the First Amendment. It is the Fourteenth Amendment that is the instrument for transmitting the principles of the First Amendment guarantee of freedom of speech on the State. Since the violation of the First Amendment collides with the guarantees of the Fourteenth Amendment due process clause, the test is much more definite than if only the Fourteenth Amendment were involved.

The Fourteenth Amendment "protects the citizen against the State itself and all its creatures".....WEST VIRGINIA BOARD OF EDUCATION -v- BARNETTE, 319 U.S. 624, at 637. The Fourteenth Amendment, as now must be applied, bears directly on the State, however, the guarantee of freedom of speech may

not be infringed on such slender grounds. "They are susceptible of restrictions only to prevent grave and immediate danger to interests which the State may lawfully protect." BARNETTE, supra., at 639.

In this case, Wahl had important and highly discretionary functions, however, he had no functions that they may not perform within the limits of the Bill of Rights. In this case Wahl compelled Petitioner to speak and act on his behalf or face discharge. When Petitioner remained politically in-active and neutral he was discharged.

Consider, in WEST VIRGINIA BOARD OF EDUCATION -v- BARNETTE, 319 U.S. 624, at 642, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty can prescribe what is orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." [Judicial Notice]

Also, BRANTI -v- FINKEL, 100 S.Ct. 1287 (1980), dictates that government, unless it can demonstrate, "an overriding interest" 427 U.S. at 368, 96 S. Ct. at 2687, "of vital importance" Id., at 362, 96 S. Ct. at 2684, "his beliefs cannot be the sole basis for depriving him of continued public employment." BRANTI, supra at 516.

Similarily, RUTAN -v- REPUBLICAN PARTY OF ILLINOIS,

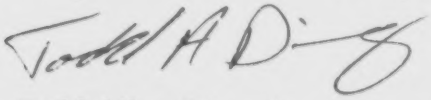
110 S. Ct. 2729, holds that discharge of a public employee (a deputy sheriff), without compelling vital governmental interest, for the sole purpose of political affiliation and belief is an unconstitutional condition. See also: ELROD, 427 U.S. at 362-363, 96 S. Ct. at 2684 (plurality opinion), and 376, 96 S. Ct. at 2690.

It is the requirements of the Fourteenth Amendment that transmitted these guarantees under the First Amendment to the Petitioner, Thusly, it is the specific limitations of the First Amendment that finally governs the case now before the Court.

Thusly, because of the infringement of other guarantees secured Petitioner by the United States Constitution, Petitioner was denied due process of law under the Fourteenth Amendment.

In summary, this Petition should be granted because important substantial provisions of freedom of speech and due process of law have been violated by the expansion of Upton to include as an appropriate consideration political in-activity and neutrality that compels speech in the form of political activity.

Respectfully Submitted,



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Petitioner pro-se

In the

United States Court of Appeals

For the Seventh Circuit

No. 91-3410

TODD A. DIMMIG,

Plaintiff-Appellant,

v.

ROBERT "PETE" WAHL,
individually and as
Sheriff of LaSalle County
and LASALLE COUNTY, ILLINOIS,
a body politic,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 C 5122—James F. Holderman, *Judge.*

ARGUED OCTOBER 20, 1992—DECIDED JANUARY 6, 1993

Before BAUER, *Chief Judge,* POSNER, *Circuit Judge,* and ESCHBACH, *Senior Circuit Judge.*

BAUER, *Chief Judge.* Todd Dimmig filed suit under 42 U.S.C. § 1983 against defendants Robert "Pete" Wahl, individually and in his capacity as Sheriff, and LaSalle County, Illinois. He seeks money damages for alleged violations of his rights under the First and Fourteenth Amendments to the United States Constitution. The district court dismissed Dimmig's complaint, and he appeals. We affirm.

I.

Dimmig alleges the following facts in his complaint. Robert "Pete" Wahl was (and is) the Sheriff of LaSalle County, Illinois. Pls. Compl. at ¶ 5. As Sheriff, Wahl established a personnel policy ("the policy") for the LaSalle County Sheriff's Department ("the department"). The policy required that the probationary personnel of the department actively participate in Wahl's campaign for re-election as Sheriff. *Id.* at ¶ 1. From October 10, 1989 until approximately July 2, 1990, Dimmig worked as a Probationary Sheriff's Deputy for the department. *Id.* at ¶ 7. In mid-June of 1990, Wahl asked Dimmig to campaign for him to help get him re-elected. *Id.* at ¶ 8. Dimmig refused. On July 2, 1990, Wahl fired Dimmig in retaliation for his refusal to engage in political activity on Wahl's behalf. *Id.* at ¶¶ 9-10.

Dimmig filed suit alleging that the policy itself and Wahl's action against him violated his First Amendment rights. *Id.* at ¶¶ 14-15.[1] After the defendants filed a motion for judgment on the pleadings, the district court dismissed Dimmig's complaint. Dimmig appeals.

II.

We review a grant of a motion to dismiss *de novo*. *Scott v. O'Grady*, 975 F.2d 366, 368 (7th Cir. 1992). We accept all well-pleaded facts alleged in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Id.*; *Prince v. Rescorp Realty*, 940 F.2d 1104, 1106 (7th Cir. 1991). We are not, however, required " 'to ignore any facts set forth in the complaint that undermine the plaintiff's claim or to assign any weight to unsupported conclusions of law.' " *Scott*, 975 F.2d at 368 (quoting *R.J.R.*

[1] The First Amendment provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

Servs., Inc. v. Aetna Casualty and Surety Co., 895 F.2d 279, 281 (7th Cir. 1989)). With these standards in mind, we review Dimmig's appeal.

Dimmig claims that he is entitled to relief because the political neutrality of a deputy sheriff is not an appropriate consideration for discharge from employment. Appellant's Brief at 7. We do not agree.

In *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1262 (1992), we considered two cases, consolidated on appeal, involving two deputy sheriffs in different Illinois counties. The two deputies claimed that their discharges were impermissibly motivated by their respective sheriffs' opposition to their political party affiliations. 930 F.2d at 1210. The deputies in *Upton* alleged that, as deputy sheriffs, the First Amendment protected them from this type of politically-motivated firing. *Id.* We rejected the deputies' claims in *Upton* and instead concluded that "deputy sheriffs operate with a sufficient level of autonomy and discretionary authority to justify a sheriff's use of political considerations when determining who will serve as deputies." *Id.* at 1218. *See also Terry v. Cook*, 866 F.2d 373, 377 (11th Cir. 1989) (sheriff has absolute authority over deputy sheriffs' appointment and retention and does not violate the First Amendment by discharging deputy sheriffs that did not support his election).

In this case, Wahl used political considerations—Dimmig's refusal to campaign for his re-election—to determine that Dimmig would no longer serve as a deputy sheriff. Dimmig attempts to distinguish *Upton* by noting, correctly, that the deputy sheriffs in *Upton* actively campaigned *against* the sheriff. Here, however, Dimmig remained neutral and campaigned against no one. Appellant's Brief at 16. Dimmig maintains that Wahl discharged him because he (Dimmig) chose to remain politically inactive. *Id.* at 18. This neutrality, he contends, did not affect his loyalty or ability to enforce the law of the State of Illinois as his employer saw fit. *Id.*

Dimmig's attempted distinction from *Upton* lacks merit. We held in that case that Illinois sheriffs do not violate the First Amendment by taking political considerations into account when deciding whether to fire a particular deputy sheriff. *Upton*, 930 F.2d at 1218. The question under this approach, as the Supreme Court has noted, "is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel*, 445 U.S. 507, 518 (1980). In *Upton*, we answered this question by holding that "under the First Amendment as interpreted . . . a sheriff may use political considerations when determining who will serve as deputy sheriff." *Id.* In this case, Wahl used political considerations in deciding that Dimmig's refusal to campaign on his behalf could hinder the effective performance of the department. As a result, Dimmig's complaint lacks merit because the Constitution permits Wahl to discharge Dimmig for refusing to campaign for him.

CONCLUSION

The judgment of the district court dismissing Dimmig's complaint is

AFFIRMED.

ESCHBACH, *Senior Circuit Judge*, dissenting. As the majority has pointed out in its opinion, the facts of this case differ from those in *Upton v. Thompson*, 930 F.2d 1209, 1216 (7th Cir. 1991). The majority holds that this distinction is inapposite because *Upton* holds that "under the First Amendment as interpreted . . . a sheriff may use political considerations when determining who will serve as deputy sheriff." *Id.* at 1218. In this case, Dimmig's complaint alleges that he was discharged for his refusal to actively campaign for the incumbent sheriff. Pls. Compl. at ¶ 9-10. The majority includes such a refusal to campaign within the boundaries of appropriate political considerations that can lead to discharge. In this way, the majority's decision in this case carries the holding in *Upton* too far. A sheriff may now use *Upton* as a tool to compel speech in the form of political activity from his deputies. A result that permits speech to be compelled is strongly repugnant to First Amendment jurisprudence.[1] For this reason, I respectfully dissent.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[1] *E.g.*, *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the *right to refrain from speaking at all.*") (emphasis added); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 633 (1943) ("It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence."); *Id.* at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

USCA AO7XXXC-92-001—Midwest Law Printing Co., Inc. Chicago—1-6-93

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF ILLINOIS

No. 90-c-5122

TODD ALLEN DIMMIG, DATE SEPT. 30, 1991

-v- Plaintiff,

ROBERT "PETE" WAHL,
individually and as Sheriff
of LaSalle County, Illinois,
a body politic,

Defendant.

Plaintiff Todd Allen Dimmig brought this civil rights action against defendants LaSalle County, Illinois and Robert "Pete" Wahl, the duly elected Sheriff of LaSalle County. Dimmig's complaint alleges Wahl discharged DImmig from his duties as a deputy sheriff of La Salle County without just and proper cause in retaliation for Dimmig's refusal to participate in Wahl's re-election campaign for Sheriff. Dimmig contends that such discharge violated Dimmig's First and Fourteenth Amendment rights to freedom of political belief and association.

The Seventh Circuit has directly addressed the issue of whether deputy sheriffs have a right to be free from politically

based firings. In Upton v. Thompson, 930 F .2d 1209 (7th Cir. 1991), the court was faced with two cases consolidated on appeal involving sheriffs sued by their discharged deputies who actively opposed the sheriffs' election campaigns. The court stated that "the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of th public office involved." Id. at 1214, quoting Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287, 1295 (1980). The court concluded that "deputy sheriffs operated with a sufficient level of autonomy and discretionary authority to justify a sheriff's use of political considerations when determining who will serve as deputies." Id. at 1218.

Dimmig contends that this case is readily distinguishable from Upton because Dimmig, unlike the plaintiffs in Upton, did not actively campaign against the defendant Sheriff, but simply refused to actively campaign for the Sheriff, thereby remaining politically neutral. The dissent to the denial of the petition to rehear Upton en banc similarly discusses the scope of the Upton Holding. See Thulen v. Bausman, 938 F .2d 84, 85 (7th Cir. 1991) (dissenting opinion questions the lack of clarity in Upton holding, such as whether the holding applies"(o)nly when deputies are politically active, or whenever they have political allegiances that differ from those of their superiors").

This court acknowledges Dimmig's argument and the Thulen dissent. However, this court remains bound by the principle of stare decisis, which demands adherence to precedents set by one's own circuit and the Supreme Court. See U.S. ex. rel. Shore v. O'Leary, 833 F .2d 663, 667 (7th Cir. 1987). Although the court in Upton emphasized the politically active nature of the plaintiffs' conduct, the court's holding plainly states that "a sheriff may use political considerations when determining who will serve as deputy sheriff." Upton, 930 F .2d at 1218 (emphasis added). The court did not limit its holding to affirmative political opposition by a deputy sheriff, but rather to "political considerations" in general. Political considerations can reasonably include Dimmig's refusal to get involved in the campaign or otherwise express his support for Sheriff Wahl. Accordingly, the court believes that, under Upton, Wahl did not violate Dimmig's First and Fourteenth Amendment rights when Wahl discharged DImmig for refusing to participate in Wahl's re-election campaign.

For these reasons, defendants' motion for judgment on the pleadings is GRANTED. This case is dismissed in its entirety.

Supreme Court of the United States

No.

A-789

Todd A. Dimmig,

Petitioner

v.

Robert "Pete" Wahl, et al.

O R D E R

UPON CONSIDERATION of the application of petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including June 5, 1993.

/s/ John Paul Stevens
Associate Justice of the Supreme Court of the United States

Dated this 15th day of April, 1993.

UNITED STATES CONSTITUTION

FIRST AMENDMENT: Congress shall make no law.....abridging the freedom of speech.....

FOURTEENTH AMENDMENT: [N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.....

FEDERAL STATUTES

28 U.S.C. 1254: Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

RELEVANT STATUTES

Ill. Rev. Stat. 1985, Ch. 38, Par. 2-13 provides that:

"Peace officer" menas any person who by virtue of his office or public employment is vested by law with a duty to maintain public order or to make arrests for offenses, whether that duty extends to all offenses, or is limited to specific offenses.

For purposes of Sections concerning unlawful use of weapons, officers, agents or employees of the federal government commissioned by federal statue to make arrests for violations of federal criminal laws shall be considered "peace officers" under this Code including, but not limited to all criminal investigators of:

(1) The United States Department of Justice, The Federal Bureau of Investigation, The Drug Enforcement Agency and The Department of Immigration and Naturalization;

(2) The United States Department of the Treasury, The Secret Service, The Bureau of Alcohol, Tobacco and Firearms and The Customs Service;

(3) The United States Internal Revenue Service;

(4) The United States General Services Administration;

(5) The United States Postal Service; and,

(6) All United States Marshals or Deputy United States Marshals whose duties involve the enforcement of federal criminal laws.

Ill. Rev. Stat., Ch. 125, Par. 7 provides that:

Each sheriff may appoint one or more deputies not exceeding the number allowed by the county board of his or her county, and take bond of security from the same for his or her indemnity. No person who has ever been classified as a conscientious objector by a local selective service draft board may be appointed as a deputy sheriff.

Ill. Rev. Stat., Ch. 125, Par. 9 provides that:

Each deputy shall, before entering upon the duties of his or her office, take an subscribe an oath or affirmation, in like form as is required of sheriffs, which shall be filed in the office of the county clerk.

Ill. Rev. Stat., Ch. 125, Par. 14A provides that:

In counties of less than 1 million population, thee sheriff shall control the internal operations of his office. Subject to the applicable county appropriation ordinance, the sheriff shall direct the county treasurer to pay, and the treasurer

shall pay , the expenditures for the sheriff's office, including payments for the personal services, equipment, materials and contractual services. purchasers of equipment by the sheriff shall be made in accordance with any ordinance requirements for centralized purchasing through another county office or through the state which are applicable to all county offices.

Ill. Rev. Stat., Ch. 125, par. 17 provides that:

Each sheriff shall be conservator of the peace in his or her county, and shall keep the same, suppress riots, routes, affrays, fighting, breaches of the peace, and prevent crime; and may arrest offenders on view, and cause them to be brought before the proper court for trial or examination.

Ill. Rev. Stat., Ch. 125, Par. 19 provides that:

Each sheriff shall, in person or by deputy, attend upon all courts held in his or her county when i session, and obey the lawful orders and directions of the court. Court services customarily performed by sheriffs shall be provided by the sheriff or his deputies, rather that by employees of the court, unless there is no deputies available to perform such services. The expenses of the sheriff in carrying out his duties under this Section, including the compensation of deputies

assigned to such services, shall be paid to the county from fees collected pursuant to court order for services of the sheriff.

Ill. Rev. Stat., Ch. 125, Par. 82 provides that:

It shall be the duty of every sheriff, coroner, and every marshall, policeman or other officer of any incorporated city, town, or village, having the power of a sheriff, when any criminal offense where breach of the peace is committed or attempted in his or her presence, forthwith to apprehend the offender and bring him or her before a judge, to be dealt with according to law; to suppress all riots and unlawful assemblies, and to keep the peace, and without delay to serve and execute all warrants and other process to him or her lawfully directed.

Ill. Rev. Stat., Ch. 34, Par. 429.18 provides that:

No county board may alter the duties, powers and functions of count officers that are specifically imposed by law. A county board may alter any other duties, powers of functions or impose additional duties, powers and functions upon county officers. In the event of a conflict State law prevails over county ordinance. This amendatory Act of 1972 does not apply to any county which is a home rule unit.

SUPREME COURT, U.S.
FILED
AUG 4 1993
OFFICE OF THE CLERK

No. 93-37

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TODD ALLEN DIMMIG,

Petitioner,

v.

ROBERT "Pete" WAHL, individually and as Sheriff of LaSalle County, Illinois, a body politic,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Circuit Court of Appeals correctly applied *Upton v. Thompson* in the instant case?

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No. 93-37

IN THE

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OCTOBER TERM, 1993

TODD ALLEN DIMMIG,

Petitioner,

v.

ROBERT "Pete" WAHL, individually and as Sheriff of LaSalle County, Illinois, a body politic,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Robert "Pete" Wahl, individually and as Sheriff of LaSalle County, Illinois, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Seventh Circuit Court of Appeals' opinion in *Dimmig v. Wahl*, 983 F.2d 86 (7th Cir. 1993).

STATEMENT OF THE CASE

The petitioner, a deputy sheriff for the LaSalle County Sheriff's Department, filed an action pursuant to 42 U.S.C. § 1983 against Robert "Pete" Wahl, individually and as Sheriff of LaSalle County, and LaSalle County, alleging he was discharged for refusing to participate in Wahl's re-election campaign for sheriff, in violation of his First and Fourteenth Amendment rights to freedom of political belief and association. (App. at 2, 6). Petitioner was a probationary employee at the time of his discharge. (App. at 2).

Wahl and LaSalle County moved for judgment on the pleadings. (App. at 2). The district court granted the motion, finding that under *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991), a sheriff may use political considerations when determining who will serve as deputy sheriff. (App. at 6-8). Therefore, the district court dismissed the action. (App. at 8).

Petitioner appealed the dismissal of his action to the Seventh Circuit Court of Appeals. The Court of Appeals affirmed the decision of the district court, finding that under *Upton* a sheriff may use political considerations in determining who will serve as deputy sheriff. (App. at 4). The court therefore concluded that the petitioner's complaint lacked merit because the constitution permitted Wahl to discharge the petitioner for refusing to campaign for him. (App. at 4).

On April 15, 1993, petitioner was granted an extension until June 5, 1993 within which to file a petition for writ of certiorari. The subject petition for writ of certiorari was filed pursuant to that extension of time.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE SEVENTH CIRCUIT COURT OF APPEALS' OPINION DECIDED NO NEW FEDERAL QUESTION WHICH WOULD WARRANT A GRANT OF CERTIORARI.

The lower court's opinion in the instant case did not address a novel issue of law. Nor did it adopt an unprecedented holding. Rather, it simply followed the precedent established within the Seventh Circuit which had found that political considerations are an appropriate job requirement for deputy sheriffs. *See Upton v. Thompson*, 930 F.2d 1209, 1218 (7th Cir. 1991), *cert. denied*, 503 U.S. ____, 112 S.Ct. 1262, 117 L.Ed.2d 491. Since the decision in question does not depart from earlier precedent, this Court should deny the petition for writ of certiorari.

II.

THE APPELLATE COURT CORRECTLY REFUSED TO DISTINGUISH BETWEEN POLITICALLY ACTIVE AND POLITICALLY INACTIVE DEPUTY SHERIFFS.

A. The Decision In The Instant Case Fell Squarely Within The Holding Of Earlier Precedent.

The holding of *Upton* was clear. It did not say that deputy sheriffs can be discharged if they actively oppose the sheriff politically; it provided that deputy sheriffs can be discharged for any political reason. As the express holding of *Upton* clearly stated:

> Based on this court's approval of political terminations in other contexts, we conclude that deputy sheriffs operate with a sufficient level of autonomy and discretionary authority to justify a sheriff's use

> of *political considerations* when determining who will serve as deputies.

930 F.2d at 1218 (emphasis added).

This holding was not simply the result of a poor choice of words, for the court again stated:

> Suffice it to say that under the First Amendment as interpreted by *Branti* . . . a sheriff may use *political considerations* when determining who will serve as deputy sheriff.

930 F.2d at 1218 (emphasis added).

Therefore, the appellate court followed precedent within the circuit in holding in the instant case that Illinois deputy sheriffs can be discharged for political considerations.

B. The Politically Active/Inactive Distinction Asserted By The Petitioner Is Inconsistent With *Elrod* And *Branti*.

Petitioner attempts to distinguish himself from the plaintiffs in *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991), *cert. denied*, 503 U.S. ____, 112 S.Ct. 1262, 117 L.Ed.2d 491 (1992), on the ground that he allegedly remained politically inactive while the deputy sheriffs in *Upton* were politically active. This asserted distinction is inconsistent with this Court's decisions regarding politically motivated discharges.

This Court's cases dealing with political discharges have long dealt with those fired for their failure to support their employer in a campaign, the so-called "politically inactive". For example, both *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2683, 49 L.Ed.2d 547 (1976) and *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980) dealt with plaintiffs who were "politically inactive," in the sense that they did not actively oppose the defendants. In

Elrod, the plaintiffs allegedly were discharged or threatened with discharge because they were not affiliated with or sponsored by the Democratic party.

In *Branti*, the plaintiffs were discharged simply because they were Republicans and the new public defender was a Democrat. The plaintiffs did not campaign against or oppose the new public defender. In fact the public defender was not even an elected position; he was appointed by the county legislature.

Similarly, in *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990), the plaintiffs were politically inactive. They alleged that they were denied promotions or jobs because they had not supported the Republican party, the party in power. They did not campaign against it; they simply were not members of it or did not have its support. 497 U.S. at 66-67.

In none of these cases did this Court distinguish between employees who were politically active and those who were politically inactive. Instead, this Court focused on the nature of the position held by the employee and whether political considerations were an appropriate requirement for that job, not whether that particular employee's activities disrupted the functioning of the office in question.

It would be inconsistent with the rationale underlying *Elrod* and *Branti* to change the focus in political discharge cases from the nature of the position held by the employee to the nature of the political activity engaged in by the employee. In *Elrod*, this Court recognized that some vital governmental interest may justify encroachment on the First Amendment rights of employees. 427 U.S. at 363, 367. Of the interests argued in support of the challenged practices of political patronage, the Court acknowledged

as valid the need for the political loyalty of some employees to assure that representative government is not undercut by tactics obstructing the implementation of the policies of the administration. 427 U.S. at 367. In order to appoint those who are politically loyal to certain positions, some employees may need to be discharged, not because they actively opposed the administration, but simply in order to make the positions available. In other words, the valid governmental interest recognized in *Elrod* had nothing to do with the individual employee's conduct. It had to do with whether it was appropriate for an elected official to fire employees, regardless of their activities or beliefs, so as to replace them with those loyal to him.

Again, in *Branti*, this Court focused on the issue from the viewpoint of the employer, not the employee. In deciding when certain employees can be discharged for political reasons, this Court noted that a position may be appropriately considered political even though it is not confidential or policymaking in character, and that party affiliation is not necessarily relevant to every confidential or policymaking position. 445 U.S. at 518. This Court concluded that political affiliation could be the reason for discharging a public employee where the hiring authority could demonstrate that party affiliation was an appropriate requirement for the effective performance of the public office involved. 445 U.S. at 518. This Court then examined the position of assistant public defender, not the nature of the political activity engaged in by the plaintiffs, in order to determine whether the political discharges were justified.

The Seventh Circuit Court of Appeals followed the *Branti* analysis in *Upton* to hold that political considerations are an appropriate requirement for the effective per-

formance of the position of deputy sheriff. 930 F.2d at 1215. The instant case dealt with a deputy sheriff allegedly discharged for political reasons. Therefore, the appellate court properly followed *Upton* in this case, regardless of the nature of the political activity or inactivity engaged in by the deputy sheriff. The test depends on the job he holds, not the nature of his conduct.

In *Branti*, this Court explicitly rejected an argument which would have made the analysis dependent upon the nature of the political activity engaged in by the plaintiffs. The petitioner in *Branti* argued that *Elrod* prohibited only dismissals resulting from an employee's failure to capitulate to political coercion. Thus, petitioner contended, as long as an employee was not asked to change his political affiliation or to contribute to or to work for a particular candidate, the employee could be dismissed with impunity. 445 U.S. at 516. This Court rejected the argument finding it would emasculate the principles of *Elrod*. 445 U.S. at 516.

The same considerations apply to petitioner's arguments in the instant case. Just as distinguishing between those who do not capitulate to political coercion and those not asked to change political affiliation would be inconsistent with *Elrod*, so too, distinguishing between those who are politically inactive and those who are politically active would be inconsistent with the principles involved. Those who voice their opinions would be afforded less First Amendment protections than those who remained silent. This somewhat incongruous result is at odds with traditional First Amendment analysis, which usually recognizes that greater protection is needed by those who speak out and say the unpopular.

Thus, petitioner's asserted distinction is at odds with the principles on which *Elrod* and *Branti* are based. Therefore, the instant case does not merit review by this Court.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 93-37

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

TODD ALLEN DIMMIG, Petitioner,

-Vs-

ROBERT "Pete" WAHL, individually and as Sheriff of LaSalle, County, Illinois, a body politic, Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

WHETHER THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT VIOLATED FREEDOM OF SPEECH AND DUE PROCESS OF LAW IN EXPANDING UPTON -V- THOMPSON, 930 F.2d 1209 (1991) TO INCLUDE POLITICAL IN-ACTIVITY AS AN APPROPRIATE CONSIDERATION WHO WILL SERVE AS A DEPUTY SHERIFF IN VIOLATION OF DEPUTY'S RIGHT TO SPEAK FREELY AND THE RIGHT TO REFRAIN FROM SPEARING AT ALL THROUGH WORDS OR ACTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS?

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No. 93-37

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

TODD ALLEN DIMMIG, Petitioner,

-Vs-

ROBERT "Pete"WAHL, individually and as Sheriff of LaSalle County, Illinois, a body politic, Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

Petitioner, TODD ALLEN DIMMIG, respectfully requests that this Court deny Respondent's Brief in opposition, and grant Petition for Writ of Certiorari seeking review of the Seventh Circuit Court of Appeal's opinion in DIMMIG -V- WAHL, 983 F.2d 86 (7th Cir. 1993).

STATEMENT OF THE CASE

The petitioner, a deputy for the LaSalle County Sheriff's Department, filed suit pursuant to **42 U.S.C. Section 1983** against **ROBERT "Pete" WAHL**, individually and as Sheriff of LaSalle County, alleging he was improperly discharged for his refusal to actively campaign for Wahl in violation of his First and Fourteenth Amendment Rights (P. App. 2,6).

Respondent, **ROBERT "Pete" WAHL**, moved for and was granted judgment on the pleading, the district court dismissed the action in its entirely (P. App 6-8).

Petitioner appealed the dismissal of his action to the Seventh Circuit Court of Appeals. The Court of Appeals Affirmed the decision of the district court (P. App 1-5).

On April 15, 1993 Petitioner was granted an extension of time within which to file a Petition For Writ Certiorari until June 5, 1993 (P. App 9). Petition for Writ of Certiorari was filed pursuant to that extension of time.

On or about August 10, 1993, Respondent

filed his brief in opposition.

REASONS WHY RESPONDENT'S BRIEF IN OPPOSITION SHOULD BE DENIED

I.

THE SEVENTH CIRCUIT COURT OF APPEALS HAS EXPANDED UPTON -V- THOMPSON BEYOND REASON REQUIRING ISSUANCE OF WRIT OF CERTIORARI FOR SPECIAL AND IMPORTANT REASONS.

In the instant case Petitioner contends that the expansion of **UPTON -V- THOMPSON**, 430 F.2d 1209 (1991) cert. denied, 503 U.S. __ 112 S.Ct. 1262, 117 L.Ed. 491 (1992) goes beyond reason and violates his right to speak freely and his right to refrain from speaking at all under the First and Fourteenth Amendments.

Respondent contends in his brief in opposition that **UPTON** allows sheriffs to discharge deputies for political requirements. However, **UPTON**, prior to this case, emphasized and focused on the political activity of deputy sheriffs against sheriffs. The political activity against the sheriff was the basis in the determination who would serve as a

deputy, whether the political activity could hinder the effective performance of the sheriff's office. The Court of Appeals has now expanded **UPTON** to include as an appropriate political consideration political in-activity in determining who will serve as a deputy sheriff. Additionally, **UPTON** is still unclear as to whether the holding applies only when deputies are politically active, or whenever they have political allegiances that differ from those of their superiors. At any rate, the Court of Appeals holds that under the First Amendment as interpreted....a sheriff may use political considerations when determining who will serve as deputy sheriff." Id. 430 F.2d 1218. In the instant case, the refusal of Petitioner to actively campaign on behalf of Wahl for Sheriff was included within the boundaries of appropriate political considerations that can lead to discharge. It is in this manner that the holding in this case carries **UPTON** to far, the sheriff may now use **UPTON** as a tool to compel speech in the form of political activity from his deputies. This result is strongly repugnant to First Amendment jurisprudence: **WEST VIRGINIA BOARD OF EDUCATION -V- BARNETTE**, 319 U.S. 624, 63 S.Ct. 1178, (1943) (P. at 6,7,9,10,16,17,18).

It is the compelling of speech in this manner that is at question in this case.

In **ELROD -V- BURNS**, 427 U.S. 347, 96 S.Ct. 2683, 49 L.Ed. 2d. 547 (1976), (P. at 15) the distinction was the discharge or threatened discharge of the plaintiffs because they were not affiliated with or sponsored by the Democratic party, not political activity/ in-activity against the party in power. In **BRANTI -V- FINKEL**, 445 U.S. 507,100 S.Ct. 1287, 63 L.Ed. 2d. 574 (1980), (P at 16) the plaintiffs were discharged because they were Republicans and the public defender was a Democrat, again not for political activity/in-activity against the party in power. In **RUTAN -V- REPUBLICAN PARTY OF ILLINOIS**, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed. 2d 52 (1990) the allegations were that plaintiffs had been denied promotions or jobs because they had not supported the party in power, similarly not for political activity/in-activity.

In each of these cases (**Branti; Elrod, Rutan**) the focus or emphasis of the political consideration is not explicitly activity against a party nor is it explicitly political in-activity. In **UPTON** the focus or emphasis was on the political activity against the sheriff. In this case the focus or

emphasis is on the political in-activity, resulting in the expansion of **UPTON** and the compelling of speech in the form of political activity. This result gives rise to a grave constitutional question as to the constitutionality of that compelling of speech.

Since a substantial constitutional question has been presented, the Respondent's brief in opposition should be denied and the Writ of Certiorari should issue.

II.

RESPONDENT'S BRIEF IN OPPOSITION RAISES QUESTION OTHER THAN QUESTION PRESENTED FOR REVIEW IN ORIGINAL PETITION FOR WRIT OF CERTIORARI.

In the instant case Respondent raises the question of whether **UPTON** has been applied correctly (R.B. at i). Respondent's question not only raises an additional question but also changes the substance of the question already presented.

Although Respondent is not required to adhere to the identical wording of the question already presented, he may not raise any additional question or change the substance of the question already

presented.

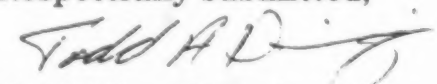
In case now before the Court, the question raised is clear and specific. The question is whether the expansion of **UPTON** violates the right to speak freely and the right to refrain from speaking at all, not whether **UPTON** has been applied correctly (P. at [i]).

Since Respondent has raised an additional question and has changed the substance of the question already presented, Respondent's brief in opposition should be denied and Writ of Certiorari should issue.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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